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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION
13

14 FACEBOOK, INC.,

15 Plaintiff,

16 v.

17 POWER VENTURES, INC. a Cayman Island
corporation, STEVE VACHANI, an individual;
18 DOE 1, s/b/a POWER.COM, DOES 2-25,
inclusive,
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20 Defendants.
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Case No. 5:08-cv-05780-JW (JSC)

**JOINT PRELIMINARY PRETRIAL
CONFERENCE STATEMENT**

Date: December 19, 2011
Time: 11:00 A.M.
Dept: Courtroom 9, 19th Floor
Judge: Hon. Chief Judge James Ware

1 The parties to the above-entitled action submit this Joint Preliminary Pretrial and Trial
 2 Setting Conference Statement and [Proposed] Order.

3 **I. BRIEF STATEMENT OF THE CASE**

4 **A. Facebook's Position**

5 Facebook's claims arise from Defendants' unauthorized access to Facebook's website to
 6 harvest, download and store Facebook user data and other information, such as "Friends lists" and
 7 log-in credentials, for use in emulating, or "proxying," the Facebook website from outside
 8 Facebook's network. Defendants' then also used that harvested data to send more than 60,000
 9 unsolicited commercial electronic mail messages (SPAM) to Facebook's users to encourage them
 10 to join Defendants' website, www.power.com. When Facebook learned that Defendants were
 11 unlawfully accessing its website and spamming its members, it sent Defendants a cease and desist
 12 letter and sought via other technical and legal efforts to block Defendants' activity. Defendants at
 13 least twice employed their own technical measures to circumvent Facebook's multiple blocks of
 14 the power.com service, and then used a shared amazon.com server to discourage Facebook from
 15 attempting further to block them (as any block of the amazon.com server would potentially result
 16 in blocking other, legitimate businesses from using Facebook).

17 As a result, on December 30, 2008, Facebook filed suit against Power Ventures and
 18 Steve Vachani asserting claims for: (1) Violations of the Can-Spam Act (15 U.S.C. § 7701, et
 19 seq.); (2) Violations of the Computer Fraud and Abuse Act (18 U.S.C. § 1030); (3) Violations of
 20 California Penal Code Section 502; (4) Copyright Infringement; (5) Violation of the Digital
 21 Millennium Copyright Act; (6) Trademark Infringement; (7) Trademark Infringement under
 22 California Law; and (8) Unlawful, Unfair, and Fraudulent Competition Under California Bus. &
 23 Prof. Code § 17200). The parties stipulated to the dismissal of counts 4 through 8 on February 17,
 24 2011.

25 **B. Defendants' Position**

26 Beginning in 2006, defendant Power operated a website known as Power.com, which
 27 allowed users to access various social networking websites (*e.g.* MySpace and Orkut) in one
 28 place. Specifically, Power created a browser that allowed users to login and access all of their

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1 various social networking accounts at once. Users could update their photos, messages, music,
 2 and videos, and these updates would be portable across various social networking sites. For
 3 approximately two months from December 2008 through January 2009, Power offered Facebook
 4 users the ability to connect to Facebook through Power's browser. Power did not access
 5 Facebook's website without permission. Power did not send any SPAM emails. In fact, the
 6 emails Facebook complains about were sent by Facebook itself.

7 In late December 2008, Facebook attempted to prevent Power's users from accessing
 8 Facebook through Power.com by blocking one IP address utilized by Power. This IP block was
 9 ineffective because Facebook blocked only one outdated IP address Power had used, and did not
 10 block other IPs that Power was using in the normal course of business. After it became aware of
 11 the attempted IP blocking, Power undertook efforts to implement Facebook Connect, a platform
 12 designed by Facebook that allows third party websites like Power to connect to Facebook.
 13 Negotiations between Power and Facebook over the implementation of Facebook Connect broke
 14 down, and Power voluntarily shut down its Facebook integration completely in early 2009.
 15 Power shut down the Power.com website in April, 2011.

16 Facebook's claims have no merit. The evidence will show that no one was misled. No
 17 Facebook user ever complained about anything Power did. And Facebook suffered no damages,
 18 no loss, and no injury of any kind.

19 **II. READINESS FOR TRIAL**

20 **A. Facebook's Position**

21 This case will be ready for trial by April 2012. Discovery closes on January 20, 2012.
 22 Facebook has been forced to seek Court relief for Defendants' repeated failures to comply with
 23 their discovery obligations. As a result, Defendants served their first meaningful production on
 24 November 3, 2011. Facebook and its expert are reviewing these materials. Facebook anticipates
 25 propounding further discovery requests. In addition, Facebook intends to take additional
 26 depositions, including that of Power Ventures pursuant to Fed.R.Civ.P. 30(b)(6), Steve Vachani,
 27 and third parties. It is currently scheduled to depose one third party, a former Power employee,
 28 on December 14, 2011, and is scheduled to take the Rule 30(b)(6) deposition of defendant Power

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Ventures on January 9, 2012, followed by a deposition of defendant Steve Vachani on January 10, 2012. Power has yet to disclose any expert witnesses and, thus, Facebook does not know if additional depositions will be necessary. Facebook will, however, wish to depose Defendants' expert(s), should they file a report or other papers.

B. Defendants' Position

Defendants agree that the case will be ready for trial in April 2012. Defendants may take some additional discovery before the January 20, 2012 cut-off, but are largely prepared for trial.

Defendants dispute Facebook's assertions regarding discovery in this case. Defendants have made significant productions throughout this litigation. On February 3, defendants produced Power's PowerScript training manuals as well as a number of emails regarding the dispute with Facebook. In August, defendants subsequently produced Power's voluminous source code and various files related to how the Power browser worked. On September 15, Power produced more than 1700 pages of excerpts from the source code. On October 24, Power produced more than 109 gigabytes of files including all of Power's subversion repositories and database files. More recently, Power gave Facebook total access to Power's backup files and to Mr. Vachani's email, which includes virtually tens of thousands of emails. In stark contrast to defendants' massive production, Facebook has produced only 295 pages of documents in the three years that this case has been pending.

III. RELIEF REQUESTED

Facebook requests the following relief for each undecided claim:

A permanent injunction enjoining and restraining Defendants, and all persons or entities action in concert with them, from:

1. Soliciting and/or storing Facebook login information;
2. Accessing or attempting to access Facebook's website and computer systems;
3. Initiating unsolicited electronic mail messages to Facebook users;
4. Procuring unsolicited commercial electronic mail messages to Facebook users;
5. Engaging in any activity that disrupts, diminishes the quality of, interferes with the performance of, or impairs the functionality of Facebook's website; and
6. Engaging in any act that violates Facebook's Terms of Use.

An award to Facebook of damages, including but not limited to, compensatory, statutory, and punitive damages, as permitted by law and in

such amounts to be proven at trial.

An award to Facebook of reasonable costs, including reasonable attorneys' fees.

For pre and post-judgment interest as allowed by law.

For such other relief as the Court may deem just and proper.

IV. AMOUNT OF TIME TO ALLOCATE TO TRIAL

Facebook anticipates that trial will last approximately four 7-hour Court days. It may be possible to reduce the length of trial through stipulations and/or motions for summary judgment/adjudication. Accordingly, the parties request that the Court defer trial time allocation until the Court has ruled on dispositive motions.

V. CALENDAR PERIOD FOR TRIAL

The parties are available April 23-27, April 30-May 4, and May 7-11.

VI. SETTLEMENT AND ADR

The parties engaged in an ADR mediation session on December 14, 2009. The session was facilitated by mediator Daralyn Durie. *See* Dkt. No. 59. Facebook has repeatedly proposed that the parties settle this action. Defendants have not made a counter-offer.

Dated: December 9, 2011

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ I. Neel Chatterjee /s/

I. Neel Chatterjee
Attorneys for Plaintiff
FACEBOOK, INC.

Dated: December 9, 2011

BURSOR AND FISHER, P.A.

/s/ L. Timothy Fisher /s/

L. Timothy Fisher
Attorneys for Defendants
VACHANI AND POWER VENTURES

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Filer's Attestation: Pursuant to General Order No. 45, §X(B), I attest under penalty of perjury that concurrence in the filing of the document has been obtained from its signatory.

Dated: December 9, 2011

Respectfully submitted,

/s/ Morvarid Metanat /s/

Morvarid Metanat